

Supreme Court, U. S.

FILED

APR 11 1979

MICHAEL ROLAND, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM 1979

No. 78-1552

JAMES EDWARD COHRAN,
Petitioner,

V.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

EDWARD T. M. GARLAND
GARLAND, NUCKOLLS & KADISH, P.C.
1012 Candler Building
Atlanta, Georgia 30303
(404) 577-2225

TABLE OF CONTENTS

	Page
Opinions Below.....	1
Jurisdiction.....	1
Question Presented for Review.....	2
Constitutional Provisions Involved.....	2
Prefatory Statement.....	2
Statement of the Case.....	2
Reason for Granting the Writ.....	4
THIS COURT SHOULD FURTHER DEFINE SEARCH AND SEIZURE LAW TO CLARIFY THE TEST AS TO HOW "FRESH" INFORMA- TION CONTAINED IN AN AFFIDAVIT FOR SEARCH WARRANT MUST BE WHEN THE SPECIFIC ITEMS IN QUESTION ARE CON- CEALED OR DESCRIBED ON PREMISES AND SAID ITEMS ARE KNOWN TO BE REMOVABLE.	
Conclusion.....	9
Certificate of Service.....	10
Appendix A.....	1a
Appendix B.....	1b

TABLE OF CITATIONS

Cases	Page
<i>Durham v. United States</i> , 403 F.2d 190 (9th Cir. 1968)	5
<i>Sgro v. United States</i> , 283 U.S. 206 (1932)	5, 6
<i>Spinelli v. United States</i> , 393 U.S. 410 (1969)	5
<i>United States v. DiAvro</i> , 540 F.2d 503 (1st Cir. 1976)	6
<i>United States v. Holliday</i> , 474 F.2d 320 (10th Cir. 1973)	5
<i>United States v. Neal</i> , 500 F.2d 305 (10th Cir. 1974)	6, 7
<i>United States v. Prant</i> , 526 F.2d 386 (5th Cir. 1976)	6
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963)	8

IN THE Supreme Court of the United States OCTOBER TERM 1979

No. _____

JAMES EDWARD COHRAN,
Petitioner,

V.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

The petitioner, James Edward Cohran, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On March 12, 1979, the United States Court of Appeals for the Fifth Circuit affirmed the conviction in this case per curiam without an opinion. See Appendix A.

JURISDICTION

Jurisdiction of this appeal is grounded in a March 13, 1979 decision of the United States Court of Appeals for

the Fifth Circuit. The statutory provision conferring jurisdiction for this appeal is 28 U.S.C. 1254.

QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONER WAS DENIED HIS FOURTH AMENDMENT RIGHT TO BE SECURE FROM UNREASONABLE SEARCHES AND SEIZURES WHEN THE TRIAL COURT OVERRULED PETITIONER'S MOTION TO SUPPRESS, SINCE THE INFORMATION CONTAINED IN THE SEARCH WARRANT AFFIDAVIT WAS STALE AND, THEREFORE, INSUFFICIENT TO ESTABLISH PROBABLE CAUSE.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, United States Constitution:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

PREFATORY STATEMENT

The record of this case is comprised of six volumes, numbered in Arabic numerals. All citations will appear to the Arabic number followed by the page reference, e.g., "V.1:12".

STATEMENT OF THE CASE

Petitioner, the owner of Roadrunner Trucking Company, was indicted on November 22, 1977. The indictment

ment charged him with two counts of concealing stolen merchandise which moved in interstate commerce; two counts of moving stolen merchandise in interstate commerce; one count of the interstate transportation of a stolen motor vehicle and one count of removing property to prevent lawful seizure. Petitioner proceeded to trial which commenced on April 10, 1978, and which concluded on April 13, 1978. On April 13, 1978, Petitioner's counsel made a Motion for Severance of count six of the indictment, which the Court granted. That same day, the jury reached a verdict of guilty as to counts one through three and a verdict of not guilty as to counts four and five. Petitioner was sentenced on July 31, 1978 to six years of imprisonment.

Petitioner respectfully submits the following chronology with respect to the "staleness" issue presented here:

1. On January 31, 1978, Petitioner filed a "Motion to Suppress Evidence" which set forth various grounds as to why search warrants issued by Magistrate Joel M. Feldman on April 15, 1976, April 30, 1976 and December 17, 1976, in connection with this case, were fatally defective.

2. On April 15, 1976, based upon a supporting affidavit submitted by F.B.I. Agent Robert S. Allen, (see Appendix B), Magistrate Feldman issued 12 search warrants: one for the Roadrunner repair garage (V.1:80), one for its dispatch office (V.1:81), and one for each of ten truck tractors operated by Roadrunner (V.1:59-90). On April 19 and 21, 1976, F.B.I. agents made searches and certain seizures at the dispatch office, repair garage and on 8 of 10 trucks operated by Roadrunner (V.1:59-90). Two of the warrants were returned unexecuted since the trucks

to be searched were not found on the premises of Roadrunner (V.1:77) (V.1:79).

3. On April 30, 1976, based upon a supplemental affidavit by F.B.I. Agent Allen, Magistrate Feldman issued two search warrants for the two trucks which had not been searched pursuant to the April 15 warrants (V.1:108). Again these two trucks were not found and the two search warrants were returned unexecuted.

4. On December 17, 1976, based on a supporting affidavit by Agent Allen, Magistrate Feldman issued a search warrant for the same truck previously searched pursuant to a warrant issued April 15, 1976 (V.1:112). This warrant was executed on December 17, 1976, and the vehicle described therein was seized (V.1:113).

5. On March 31, 1978, Magistrate Allen L. Chancey, Jr. in his Magistrate's Report and Recommendation upon Defendant's Motion to Suppress concluded that Petitioner's Motion to Suppress evidence seized pursuant to the search warrants in this case should be overruled and denied except as to the evidence seized pursuant to the search warrant for the dispatch office.

6. On April 5, 1978, United States District Judge Harold L. Murphy ordered that the Magistrate's Report and Recommendation be adopted as the opinion and Order of the Court.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD FURTHER DEFINE SEARCH AND SEIZURE LAW TO CLARIFY THE TEST AS TO HOW "FRESH" INFORMATION CONTAINED IN AN AFFIDAVIT FOR SEARCH WARRANT MUST BE WHEN THE

SPECIFIC ITEMS IN QUESTION ARE CONCEALED OR DESCRIBED ON PREMISES AND SAID ITEMS ARE KNOWN TO BE REMOVABLE.

Under the Fourth Amendment, a warrant may not properly issue for search of a private dwelling unless probable cause therefor can be found from facts or circumstances presented under oath or affirmation, and mere affirmation of belief or suspicion is not enough. *Spinelli v. United States*, 393 U.S. 410 (1969).

One factor in determining probable cause for a search warrant is the time which elapses between the date of the observed offense and the making of the affidavit upon which the warrant is based. *Sgro v. United States*, 283 U.S. 206 (1932). In fact, the element of time is crucial to the concept of probable cause for issuing a search warrant. *Sgro v. United States*, *supra*; *United States v. Holliday*, 474 F.2d 320 (10th Cir. 1973).

The issue as to staleness of information for the search warrant is not whether recent facts give rise to probable cause to believe that a crime has been committed, but whether probable cause to believe that the items sought are on the premises is sufficiently fresh. *Sgro v. United States*, *supra*.

In *Durham v. United States*, 403 F.2d 190 (9th Cir. 1968), the Court elaborated on the timeliness by citing the Manual for United States Commissioners 24 (1948):

The facts must show that the *property to be seized was known to be at the place to be searched* so recently as to justify the belief that the property is still there at the time of the issuance of the warrant. (Emphasis added).

Furthermore, timeliness as an element in determining probable cause for issuance of a search warrant, must be determined by the circumstances of each case. *United States v. Prant*, 526 F.2d 386 (5th Cir. 1976); *United States v. DiAvro*, 540 F.2d 503 (1st Cir. 1976). The Circuit Courts leave undefined the question as to how "fresh" information must be when the specific items in question are concealed on described premises and said items are known to be removable. In *United States v. Neal*, 500 2F.d 305 (10th Cir. 1974), the Court granted a "Motion to Suppress" on the ground that the property alleged to have been concealed on the described premises was removable and that there was no information from which it could be inferred that the material sought to be recovered remained on the described premises. The search warrant affidavit was found to be insufficient in that stale information could not be considered as constituting probable cause for issuance of a search warrant. Circuit Court cases show, however, that the timeliness element in determining probable cause for issuance of a search warrant is loosely defined by the courts, resulting in conflicting Circuit Court decisions. This court has said nothing on the "staleness" issue since *Sgro v. United States*, *supra*, which was decided in 1932. Thus, it would appear that the important "staleness" question should be further reviewed by the Supreme Court of the United States so that the law on the timeliness element in determining probable cause for issuance of a search warrant can be further defined.

In the case at bar, the most blatant violation of timeliness requirement concerns paragraphs 5, 6, and 13 of Agent Allen's affidavit. (Appendix B) The affidavit alleges that in February or March of 1974, a Cummins engine

which bore no data plate was being placed in Vehicle #7. This observation was made in excess of two years and one month (or 660 days) prior to the presentation of the affidavit to Magistrate Feldman. Just as in *United States v. Neal*, *supra*, the property in question was an allegedly stolen motor vehicle part, which by its nature is removable. There is no reference or information in the affidavit which places the Cummins engine in that same vehicle at any time during the next two years. The allegation that the same vehicle was seen on or about the Roadrunner premises two months prior to the issuance of the warrant is insufficient to infer that an engine which had been put in that vehicle over two years ago, remained in that vehicle. Common sense dictates that the information in the affidavit was too remote to be a valid basis for probable cause.

The information contained in Agent Allen's affidavit which pertains to the alleged theft of two International Truck Tractors, was also stale. The affidavit advised that a confidential source informed the affiant that on September or October of 1975, two trucks were stolen from International Harvester Company and that in October of 1976, he observed a stolen part being placed in a Peterbilt truck tractor belonging to Roadrunner Transportation, Inc. Again, the assumption that an allegedly stolen motor vehicle part is still in that truck about a half a year later is unreasonable.

Next, the allegation that a 1972 White Freightliner truck tractor which was acquired by Roadrunner more than ten months prior to the issuance of the search warrant is not sufficiently fresh to indicate that the vehicle sought was still on the premises in late April when the search was executed. Regardless of the untimeliness of

this information, one would expect to see at Petitioner's place of business a truck which he had previously purchased.

Lastly, while the warrants obtained on April 30, 1976, and the warrant obtained on December 17, 1976, had their own affidavit in support of said warrants, these affidavits were based on the original affidavit (Appendix B) and information obtained from the original April 19 and 21, 1976 searches and seizures based on Appendix B. All information and/or items obtained by the Government as a result of two subsequent searches should be suppressed pursuant to the "fruit of the poisonous tree doctrine" because the subsequent searches were tainted by the aforementioned defects in the April 15th affidavit (Appendix B). *Wong Sun v. United States*, 371 U.S. 471 (1963).

The issue concerning staleness of the affidavit is a substantial question to be presented to this Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

GARLAND, NUCKOLLS & KADISH, P.C.

/s/ EDWARD T. M. GARLAND

EDWARD T. M. GARLAND

Attorney for Petitioner

1012 Candler Building
Atlanta, Georgia 30303
404/577-2225

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing Brief of Appellant upon Mr. William Bartee, Assistant United States Attorney, Northern District of Georgia, Atlanta Division, by depositing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This the 11th day of April, 1979.

/s/ EDWARD T. M. GARLAND

EDWARD T. M. GARLAND

Appendices

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 78-5514

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES EDWARD COHRAN,

Defendant-Appellant.

**Appeal from the United States District Court for the
Northern District of Georgia**

(MARCH 12, 1979)

Before MORGAN, FAY and RUBIN, Circuit Judges.
PER CURIAM: AFFIRMED. See Local Rule 21.¹

¹ See *N.L.R.B. v. Amalgamated Clothing Workers of America*, 5 Cir., 1970, 430 F.2d 966.

APPENDIX B

STATE OF GEORGIA }
COUNTY OF FULTON }

AFFIDAVIT OF SPECIAL AGENT

ROBERT S. ALLEN

I have been a Special Agent with the Federal Bureau of Investigation for the past four and one-half years and during the past four years I have specialized in investigations regarding stolen tractor trailers and stolen parts from tractor trailers.

Because of the information set out hereafter I believe that trucks within the fleet operated by Roadrunner Transportation, Inc. of Forest Park, Georgia contain stolen diesel engines, transmissions, cabs, fifth wheels, rear axles and other component parts, which parts have substantial value and which parts have been transported in interstate commerce. Further, for reasons set out below, I believe that at least one of the trucks within the fleet is a stolen motor vehicle which has been transported in interstate commerce. Finally, I believe that records pertaining to title of the vehicles, maintenance records of the vehicles and records documenting the interstate transportation of the vehicles and parts are located on the premises of the company's dispatching office and repair shop.

Specifically, I believe that there are component parts from two International tractors, which truck tractors were stolen in the Atlanta area during the fall of 1975, in the tractors in the fleet of Roadrunner Transportation, Inc. I believe that there is a stolen Cummins diesel engine in a 1971 White Freightliner truck tractor operated in

the fleet. Finally, I believe that another White Freightliner truck tractor in the fleet is a stolen motor vehicle.

Roadrunner Transportation, Inc. is a non-regulated low cost carrier of commodities. The greatest costs for companies like Roadrunner, and other independent truckers, are maintenance and the cost of purchasing the basic vehicles. Serviceable tractors cost from \$25,000 to \$40,000 each. My experience in the field has revealed that stolen truck tractors can be purchased from \$500 to \$5,000. Further, I learned that stolen relatively new engines, transmissions, cabs, fifth wheels, and rear axles can be purchased for prices under the cost of a legitimate overhaul or replacement. Because of these relationships, the FBI both within the Northern District of Georgia and around the country has noticed a substantial increase in the trafficking of stolen truck tractors and their component parts.

1. On March 26, 1976, Lt. Jerry Schaffer, Clayton County Sheriff's Office, advised S/A James Y. Blankner, Jr., Federal Bureau of Investigation, that a confidential source hereinafter referred to as Source 1 advised him on March 25, 1976 that Source 1 had had several conversations with one Billy Nelson Whited, a self-employed trucker residing in Forest Park, Georgia, since January, 1976, concerning stolen truck tractors. Source 1 related that Whited had said in these conversations that he knew that two International truck tractors, stolen from the lot of International Harvester Company, Browns Mill Road, Atlanta, Georgia, were received by Roadrunner Transportation, Inc., Forest Park, Georgia. Source 1 advised that Whited indicated he had knowledge that these two International truck tractors were dismantled at a repair shop operated by Roadrunner Transportation, Inc., in

Mountain View, Georgia, and that the engines from these vehicles were placed in two truck tractors owned by Roadrunner Transportation. Source 1 advised that previously mentioned repair shop is located on South West Street immediately behind a beauty shop, which faces Old Dixie Highway in Mountain View, Georgia. On or about October 17, 1975, Billy Nelson Whited was arrested on a federal complaint charging Whited and Kermit Graye with theft of goods traveling in interstate shipment. The complaint filed Case No. M75-1259A and 1260A, N.D. Ga., Atlanta Division, states that Graye, the driver of the truck transporting the stolen goods, was promised \$4000 by Whited if Graye would let Whited steal the shipment, which he did. Graye thereafter reported the tractor-trailer and shipment stolen.

2. On April 4, 1976, a confidential source, hereafter referred to as Source 2, who has furnished information on four occasions during the past six months resulting in eight federal arrests and recovery of narcotics valued in excess of \$3,000, advised SA James Y. Blankner, Jr., Federal Bureau of Investigation, that during conversations between Source 2 and employees of Roadrunner Transportation, Inc., during the past six months, Source 2 has learned that Ed Cohran, owner of Roadrunner Transportation, and one Billy Gene Parrott had arranged the theft of two International truck tractors from International Harvester Company, Browns Mill Road, Atlanta, Georgia, between August and November, 1975. Source 2 advised that these Roadrunner employees advised Source 2 that they dismantled these two International truck tractors, both of which were equipped with "350" diesel engines and 13 speed transmissions. (From my experience I know that only Cummins and Detroit

make "350" diesel engines for truck tractors.) Source 2 advised that during his conversations with these Roadrunner employees that they related that one of the Internationals, white in color, had previously been leased to Superior Trucking Company while the other was brand new. (The International Harvester dealer from whom the two Internationals were stolen has advised that when stolen, the two International truck tractors were in running and operating condition. The brand new International was worth approximately \$32,000 retail; the other International was worth approximately \$30,000 retail.) Source 2 further advised that these Roadrunner employees told him that upon acquiring these truck tractors, both were dismantled at the truck repair shop operated by Roadrunner Transportation and the engines from both were placed in truck tractors owned by Roadrunner Transportation. Source 2 advised that in about October, 1975, Source 2 observed one of these engines, red in color when stolen, but repainted beige, being placed in a Peterbilt truck tractor, green in color, owned by Roadrunner Transportation. Source 2 advised this engine replacement took place at the previously mentioned repair shop which is located on South West Street at Old Dixie Highway in Mountain View, Georgia.

3. I have previously seized another stolen truck tractor from Billy Gene Parrott.

4. On March 29, 1976, Clarence Franklin Sharp, Branch Manager, International Harvester Company, 3799 Browns Mill Road, Atlanta, Georgia, advised S/A James Y. Blankner, Jr., Federal Bureau of Investigation, that a theft report was filed with the Atlanta, Georgia, Police Department on September 30, 1975, by his company concerning the theft of 1975 International Transtar

II, VIN D2327EGA14209, from the company's lot. Sharp advised that this tractor trailer, white in color, engine #10475448, and a 13-speed Fuller transmission. This truck tractor had been leased to Superior Trucking Company.

Sharp advised his company also filed a theft report with the Atlanta Police Department on October 10, 1975, for a 1975 International Transtar II, Model COF4070B, Vehicle Identification Number E2327FGB10676, also stolen from the company lot. Sharp advised his truck tractor, three-tone yellow, dark brown, and buckskin in color, was also equipped with an NTC-350 Cummins Engine, red in color, engine number 10496750, and a 13-speed Fuller transmission.

5. On February 5, 1976, John Carl, Operations Manager, Cummins Georgia, Inc., Atlanta, Georgia, advised that his records reflect that on December 31, 1973, Ed Cohran, d/b/a Roadrunner Transportation, Villa Rica, Georgia, brought a White Freightliner truck tractor, partial VIN L051885 (vehicle #7), equipped with a Cummins engine, engine #754456, to his company for engine repair. Carl advised that his company eventually purchased this engine from Cohran on February 15, 1974, and they removed the engine from the vehicle. Carl further advised that in February or March of 1974 while at a truck repair shop in Atlanta, operated by Paul Ballard, he saw a Cummins Engine which bore no data plate reflecting date of manufacture, model or engine number, and on which the dye stamped engine number had been obliterated by chiseling. (From my experience, I know that identifying numbers are removed from stolen goods to conceal the true ownership of the goods. Further, altering, defacing, or removing serial number of the component parts of a motor vehicle is a felony in the State of

Georgia.) Carl further related that he observed vehicle #7 at Ballard's Shop and he observed Ballard in the process replacing the Cummins engine into vehicle #7. Ballard told Carl that he was doing the work at the instruction of Ed Cohran.

6. Records provided by Ms. Debbie Potter, State of Georgia, Department of Motor Vehicles, Atlanta, showed that Roadrunner Transportation, Inc., purchased a tag for this vehicle (vehicle #7) in 1975 and surveillance by myself and other agents has placed a vehicle of the same description around the premises of Roadrunner Transportation, Inc., within the past two months.

7. As stated above, my experiences indicate that identifying numbers are often obliterated or changed when the goods are stolen. One of the trucks in the Roadrunner fleet carries a changed vehicle identification number. On January 22, 1976, Charles R. Kittle, Accountant, Pet, Inc., Bakery Operation, Atlanta, Georgia, advised the affiant that on July 8 and July 10, respectively of 1974, two truck tractors owned by his company were wrecked and declared total losses. Both were sold for salvage. Specifically, Kittle said that a 1972 White Freightliner truck tractor, VIN CA213HM067838 and a 1971 Kenworth truck tractor were wrecked and lost. On January 22, 1976, Bill Clark, Dispatcher, Pet, Inc., Bakery Operation, Atlanta, advised the affiant that the engines, transmissions and rear axles from the 1971 Kenworth and the 1972 Freightliner were removed from those vehicles and placed in other vehicles owned by Pet, Inc. The remaining extensively damaged cabs, chassis and front axles were sold, along with the Georgia titles, the Kenworth cab, chassis, front axles and title were sold to an unknown individual in September, 1974, for \$1,000.

8. On January 23, 1976, W. Earl Stallworth, Plant Manager, Pet, Inc., Bakery Operation, Atlanta, advised the affiant that the wrecked White Freightliner and title were sold to Benny (Last name unrecalled) for \$500. Stallworth advised that he felt overpaid for the demolished White Freightliner cab, chassis, and front axles, and that it was his impression that Benny was more interested in obtaining the title.

9. On January 23, 1976, Ms. Debbie Potter, State of Georgia, Department of Motor Vehicles, Atlanta, Georgia, advised that a 1972 White Freightliner, VIN CA213HM067838 was purchased on April 17, 1975, from Pet, Inc., Bakery Operation, and retitled by one Bennie Ronald Thomas, Fairburn, Georgia. She related her records reflected that this truck tractor was sold by Thomas to Roadrunner Transportation, Inc., P. O. Box 98, Villa Rica, Georgia, on June 5, 1975 and that a 1975 Georgia license HK-6436 was issued on December 11, 1975 to Roadrunner Transportation, Inc. to use on this vehicle.

10. On January 16, 1976, I seized a 1974 Kenworth truck tractor from Billy Gene Parrott. This tractor bore altered VINs. The number shown after the alteration was 216139, the number of the demolished Pet vehicle which the company had sold for salvage. I determined through investigation that the vehicle's true number was 236742.

On January 16, 1976, a National Crime Information Center inquiry and subsequent independent investigation by the Federal Bureau of Investigation determined that a Kenworth truck tractor with number 236742 was reported stolen to the Anniston, Alabama Police Department on July 7, 1975 by a J. W. Carr, Harris Trailer

Park, Anniston, Alabama.

11. On January 16, 1976, I checked the records of the Georgia Department of Motor Vehicles and learned that Gene Parrott had applied for a Georgia Tag and Title for the Kenworth tractor showing VIN 216139. The records further reflected that he purchased the tractor from one Dale Long of Hapeville, Georgia who had purchased the vehicle from Pet, Inc.

12. On January 29, 1976, agents of the Federal Bureau of Investigation saw a White Freightliner on the premises of Roadrunner Transportation, Inc. The truck bore the tag which had been issued to the company on the title which Cohran had obtained from Thomas on the other Pet salvaged vehicle.

13. On January 23, 1976, Ms. Debbie Potter, State of Georgia, Department of Motor Vehicles, Atlanta, Georgia, supplied the following list of vehicles and 1975 Georgia licenses which the state had issued to Roadrunner Transportation, Inc.

Vehicle No. 1—1972 White Freightliner—VIN #CA213HMO67838, HK-6436

Vehicle No. 2—1973 GMC Astro truck tractor, VIN #AV568798, HK-5683

Vehicle No. 3—1972 International truck tractor, Model COF 4070A, VIN #259471G511859, HK-3245

Vehicle No. 4—1972 White Freightliner truck tractor, Model WFT 8664T, VIN #CA213HMO64266, HK-3247

Vehicle No. 5—1967 International truck tractor, Model COF4000D, VIN #359472Y011588H, (no 1975 tag, but titled by Roadrunner).

Vehicle No. 6—1972 Peterbilt truck tractor, Model 352ST, VIN #46618N, HK-3243

Vehicle No. 7—1971 White Freightliner truck tractor, Model WFT 8864, VIN #FT8664THL051885, HK-3248

Vehicle No. 8—1969 GMC Pick-up, VIN#CE10DSA-25913, CK-8659

Vehicle No. 9—1966 White truck tractor, Model 7400, VIN #7464TDB675635, HK-3246

Vehicle No. 10—1965 White Freightliner truck tractor VIN AL 18627, HK-3242

Vehicle No. 11—1972 Peterbilt truck tractor, Model Number 352ST, VIN 48102N, HK-3244

Vehicle No. 12—1974 Timppte trailer, VIN #30969, BM-7834

Vehicle No. 13—1974 Timppte trailer, VIN #28949, BM-7835

Vehicle No. 14—1973 Timppte trailer, VIN #30055, BP-1785

Vehicle No. 15—1971 Hobbs trailer, VIN # BLN 877201, BD-2541

14. Since the 1st of January, 1976, agents of the Federal Bureau of Investigation have seen truck tractors on or about the dispatching office or repair shop which vehicles generally meet the make and age description of the entire truck tractor fleet registered to Roadrunner as set out above except for vehicles No. 9 and No. 11 above.

Because Roadrunner Transportation, Inc. is an interstate carrier, it is believed that each vehicle in its fleet regularly departs and re-enters the State of Georgia.

15. On April 5, 1976, a confidential source, hereinafter referred to as source 3, who has previously furnished, corroborated information concerning theft from interstate shipment matters, and who is knowledgeable concerning the trucking business in the Forest Park, Georgia, area advised the affiant that the dispatch office of Roadrunner Transportation, Inc., is located in the office immediately

west of the main front entrance of Twin Six Truck Stop, 301 Forest Parkway, Forest Park, Georgia, a one room office shared with Central Southern Trucking. Source 3 advised that Roadrunner Transportation, Inc., hauls tractor trailer loads of refrigerated and dry commodities exempt from ICC regulation in interstate commerce.

16. On April 5, 1976, William L. Scroggs, District Supervisor, Interstate Commerce Commission, Atlanta, Georgia, advised the affiant that James Edward Cohran, President, Roadrunner Transportation, Inc., 1024 Topaz Lane, Villa Rica, Georgia, on January 16, 1975, filed an application for temporary ICC authority and in his operational feasibilities statement, filed with the application, indicated Roadrunner Transportation transports produce and other commodities exempt from ICC authority between southwest Texas, Colorado, Florida, Michigan, and New York State.

Because of the information below, I believe that the engines referred to above (the Cummins with the obliterated number and the two in the International truck tractors) have value in excess of \$5,000.

17. On April 5, 1976, Al Friel, Vice President, Cummins Georgia, Inc., Atlanta, Georgia advised the affiant that a new NTC 350 Cummins Engine is currently valued at \$12,000 and that any Cummins Engine with less than 250,000 miles which is average milage for two to three years use, is valued in excess of \$5,000.

18. On April 6, 1976, a National Crime Information Inquiry determined that neither of the truck tractors stolen from the lot of International Harvester has been recovered.

19. By surveillance and information given from the sources referred to above, I ascertained that the repair shop for Roadrunner Transportation, Inc. is located in the one story concrete block structure, dark gray in color, with a white steel garage door, located on the south side of South West Street, Mountain View, Georgia on which no street number was observed. It is located immediately behind Minnie's Beauty Shop, located on the southwest corner of Old Dixie Highway and South West Street and which faces Old Dixie Highway.

20. RECENT OBSERVATIONS—On April 13, 1976, Source 3 told me that Roadrunner Transportation, Inc. has continued to dispatch truck tractors bearing markings of Roadrunner Transportation to transport commodities in interstate commerce from the previously described dispatch office at Twin Six Truck Stop. Source 3 has also advised having observed a 1969-1970 GMC pick-up truck, faded burgundy in color, being parked in the vicinity of the Roadrunner Transportation dispatch office being operated by individuals entering and exiting the Roadrunner Transportation dispatch office on several occasions in the past week. Source 3 advised having seen an individual by the name of J. A. Fuller a/k/a Red Fuller, frequent the dispatch office during the past week. Source 3 told me that Fuller is a self-employed trucker himself. From other investigations, I know that Red Fuller has previously been convicted for interstate transportation of stolen motor vehicles.

Both myself and other agents of the Federal Bureau of Investigation have continued surveillance on a daily basis of the repair shop between April 6 and April 13, 1976. Various vehicles appearing to be identical with those set out above which have been titled to Roadrunner

Transportation, Inc. have been observed parked outside of the repair shop. Also a truck tractor, red over white bearing the name J. A. Fuller on both doors and a 1969-70 GMC pick-up truck, faded burgundy in color bearing 1976 Georgia Tag SH 2901 has been observed parked around the repair shop.

On April 13, 1976, Ms. Debbie Potter, Georgia Department of Motor Vehicles, told me that she learned from the Carroll County, Georgia tag office that 1976 Georgia Tag SH-2901 was recently issued to Roadrunner Transportation, Inc., 1024 Topaz Lane, Villa Rica, Georgia for use on vehicle No. 8.

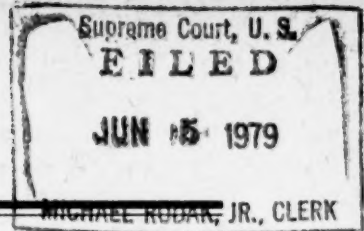
On April 13, 1976, Special Agents Mickey L. Roberts and James Y. Blankner, Jr., observed the repair shop with the garage door open and observed in addition to several of the previously described parked vehicles, two white males inside the garage working on a truck tractor.

ROBERT S. ALLEN

Sworn to before me
and subscribed in
my presence.

UNITED STATES MAGISTRATE

No. 78-1552



In the Supreme Court of the United States
OCTOBER TERM, 1978

JAMES EDWARD COHRAN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1552

JAMES EDWARD COHRAN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioner contends that the information in the affidavit submitted in support of a warrant to search his business premises was stale.

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of receiving, concealing, and storing a stolen truck tractor engine, in violation of

18 U.S.C. 2315 (Count I), transporting the stolen engine and a stolen truck tractor cab in interstate commerce, in violation of 18 U.S.C. 2314 (Count II), and transporting a stolen truck tractor in interstate commerce, in violation of 18 U.S.C. 2312 (Count III).¹ Petitioner was sentenced to a six-year term of imprisonment on Count I, and five-year terms on Counts II and III, all sentences to be served concurrently.

1. In an affidavit (Pet. App. B) filed on April 15, 1976, FBI agent Robert S. Allen alleged that component parts from two stolen truck tractors had been incorporated into a fleet of trucks owned by petitioner's company, Roadrunner Transportation, Inc. The affidavit further stated that one of Roadrunner's trucks was stolen and that another contained a stolen engine (Pet. App. 1b-2b). In support of these allegations, the affidavit recited extensive and detailed information derived from confidential informants, FBI observations, state motor vehicle agency checks, and victims' reports. Specifically, it was alleged that in the fall of 1975 two truck tractors were stolen from a dealer in Atlanta (Pet. App. 4b-5b). Information from a confidential source indicated that the stolen tractors were dismantled in Roadrunner's repair shop and that the engines from the stolen trac-

¹ Petitioner was acquitted on charges of transporting and receiving another stolen engine (Counts IV and V). Count VI, which charged petitioner with removing property to prevent its lawful seizure (18 U.S.C. 2232), was severed by the court and later dismissed on the government's motion.

tors were installed in tractors owned by Roadrunner (Pet. App. 2b-3b). Information from another confidential source indicated that petitioner had arranged the theft (Pet. App. 3b). The source added that in October 1975 he had observed the installation of one of the stolen engines in a Roadrunner tractor (Pet. App. 4b).

The affidavit further stated that an official from Cummins Georgia, Inc., a tractor engine manufacturer, had informed the FBI that in February 1974 his company bought a defective engine from Roadrunner. The official also related that, a short time later, he observed the installation of an engine with no data plate and an obliterated number stamp into the Roadrunner tractor from which the defective engine had been removed (Pet. App. 5b-6b). FBI agent Allen stated that he had seen a vehicle fitting this description on the Roadrunner premises within the previous two months (Pet. App. 6b).

The FBI's recent observations were that all of the Roadrunner vehicles that were to be searched (with two exceptions) had been seen on Roadrunner's premises within the past 10 days (Pet. App. 11b-12b). Moreover, the affidavit recited that J. A. Fuller, a man previously convicted of interstate transportation of stolen vehicles, had recently been seen in and around Roadrunner's office and repair shop (Pet. App. 11b-12b).

On April 15, 1976, on the basis of Agent Allen's affidavit, a magistrate issued 12 search warrants, one for the Roadrunner repair garage, one for its

dispatch office, and one each for 10 truck tractors operated by Roadrunner (R. 175).

2. Petitioner contends that the information in the affidavit² was too stale to support a finding of probable cause at the time the warrants were issued. Although the information placing the stolen property at Roadrunner was between two and one-half and seven months old, the information was sufficient, under the circumstances, to establish probable cause to believe that the stolen items were still on the Roadrunner premises.

The length of time between observations of criminal activity and the execution of a warrant is a factor to be considered in determining whether there is probable cause to search, but each case must be judged on its own facts. *Andresen v. Maryland*, 427 U.S. 463, 478-479 n.9 (1976); *Sgro v. United States*, 287 U.S. 206, 210-211 (1932); *United States v. Weinrich*, 586 F.2d 481, 491-492 (5th Cir. 1978); *United States v. Brinklow*, 560 F.2d 1003, 1005-1006 (10th Cir. 1977); *United States v. Forsythe*, 560 F.2d

² Three additional warrants were issued, each with its own separate affidavit. The first two, issued on April 30, 1976, gave authority to search the two vehicles that were not on the premises at the time of the initial search (R. 104-107). Those vehicles were not found. The third, issued on December 17, 1976, authorized the search of an additional vehicle (R. 112-113). Petitioner makes no independent attack on these warrants, arguing only that they were defective because they were based on information derived from the initial search (Pet. 8). If the initial warrant was valid, these warrants were plainly valid as well.

1127, 1132 (3d Cir. 1977); *United States v. DiMuro*, 540 F.2d 503, 515-516 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977). Generally, the nature of the criminal activity and the character of the property sought are determinative. See *Andresen v. Maryland*, *supra*; *United States v. Brinklow*, *supra*; *United States v. Scott*, 555 F.2d 522, 528 (5th Cir. 1977), cert. denied, 434 U.S. 985 (1977); *United States v. Dauphinee*, 538 F.2d 1, 5 (1st Cir. 1976); *United States v. Rahn*, 511 F.2d 290, 293 (10th Cir.), cert. denied, 423 U.S. 825 (1975). The basic question is whether the facts justify an inference that probable cause continues to exist. *United States v. Collins*, 559 F.2d 561, 564 (9th Cir.), cert. denied, 434 U.S. 907 (1977); *United States v. Rosenbarger*, 536 F.2d 715, 719 (6th Cir. 1976), cert. denied, 431 U.S. 965 (1977).

In the present case, the affidavit plainly supported the inference that petitioner was engaged in the continuing activity of possessing and using the stolen tractor parts. Moreover, the stolen items were permanent fixtures in the vehicles, and, since the vehicles had recently been observed on the premises, the inference was justifiable that the stolen objects were still on the premises as well. See *United States v. Brinklow*, *supra*, 560 F.2d at 1006; *United States v. Guinn*, 454 F.2d 29, 36 (5th Cir.), cert. denied, 407 U.S. 911 (1972); *Rider v. United States*, 355 F.2d 192, 193 (5th Cir. 1966). Under these circumstances, the fact that some of the information in the affidavit

was several months old did not affect the propriety of the finding of probable cause.³

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1979

³ Petitioner's reliance on *United States v. Neal*, 500 F.2d 305 (10th Cir. 1974), which also involved interstate transportation of stolen motor vehicles, is misplaced. In *Neal*, the stolen vehicles were quickly disposed of; the objects of the search were vehicle identification plates, credit cards, and other items that the government theorized might have been removed from the stolen vehicles and retained on the defendant's premises (500 F.2d at 309). The court held that there was no basis for concluding that those items, which had been observed on the premises three months earlier, were likely still to be there (*ibid.*). Here, by contrast, the trucks had recently been observed on the premises; the inference that the stolen engine and other parts were still in the trucks was a strong one.